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Loo Boo Cheai (administrator of the estate of Chan Kun Hong, deceased) v Chen Yuh Feng & Ors

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COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-02(NCVC)(W)-936–05 OF 2019
LAU BEE LAN, NOR BEE ARIFFIN AND SUPANG LIAN JJCA
2 AUGUST 2021

C

Family Law — Marriage — Validity of customary marriage — Deceased husband had customary marriage while legally married to appellant — Whether customary marriage was proven — Whether customary marriage valid — Whether first respondent was lawful widow of deceased — Law Reform (Marriage and Divorce) Act 1976 s 4

D

The appeal was primarily concerned with the legal status of the customary marriage of the first respondent to the late Chan Kun Hong ('the deceased') purportedly to have taken place in or around the month of December 1978 at
E Kaohsiung City, Taiwan ('the disputed customary marriage') when the deceased's marriage to the appellant on 15 March 1969 and registered under the Civil Marriage Ordinance No 44 of 1952 ('the CMO') was subsisting. It was not disputed that the deceased remained legally married to the appellant during his lifetime. The deceased died intestate on 30 January 2013. On
F 17 February 2014, the appellant was granted letters of administration ('LA') to administer the deceased's estate. The appellant in her capacity as the administratrix, subsequently distributed the deceased's assets and properties to the appellant and her two children as beneficiaries of the deceased in accordance with the Distribution Act 1958 ('Act 300'). The respondents
G challenged the grant of the LA to the appellant, claiming among others that the first respondent was one of the lawful widows of the deceased and she and her two daughters, who were the second and third respondents, were the lawful children and next of kin of the deceased. The appellant contended that the disputed customary marriage never took place. The appellant further
H contended that even if the disputed customary marriage did take place, it was invalid, null and void by reason of her marriage to the deceased under the CMO. The main issue to be determined in the appeal was whether the High Court was correct in concluding as a matter of law and fact that the disputed customary marriage was valid and whether the same was deemed to be
I registered under s 4 of the Law Reform (Marriage and Divorce) Act 1976 ('Act 164'). The status of the first respondent's daughters was dependent on the outcome of this issue.

Held, allowing the appeal with costs:

(1) In the court's view, the evidence taken together showed that there was no definite answer to the question of whether the Ambassador Hotel ('said hotel') was there in 1978. As things stood, there was doubt whether the disputed customary marriage was solemnised at the venue alleged by the respondents. Additionally, there was no shred of documentary evidence to show that the disputed customary marriage had taken place (see paras 35–36).

(2) In the present case, the learned judge should have determined the inherent probability or improbability of the evidence of the respondents' witnesses and the totality of the evidence adduced. The notes of proceedings showed that there were contradictions and inconsistencies in the evidence of the respondents' witnesses. The court found that the evidence adduced, which was not considered by the learned judge in his judgment, did not reasonably allow for the conclusion His Lordship had arrived at. The learned judge did not consider the appellant's case that the respondents' failure to produce any photographs of the alleged wedding was because there was never any customary marriage solemnised to begin with and that the fire incident was nothing more than just an attempt to evade the issue of failure to produce any documentary evidence of the disputed customary marriage. The court was of the view that the defendant's contention in this respect was not without basis (see paras 38–39).

(3) The court took the view that there appeared to be insufficient judicial appreciation of the evidence adduced in the court below as to whether the disputed customary marriage did take place. As the evaluation was not full and adequate and not tested against the weight of all other evidence properly placed before the court, the finding of the learned judge that the disputed customary marriage did take place, could not be said to be one which a reasonable judge could have reached (see para 48).

(4) The court was of the view that the validity of the disputed customary marriage was to be determined by the CMO. In this regard, the learned judge was plainly wrong in two respects. Firstly, the learned judge had failed to consider the force and operability of the CMO which provided for monogamous marriages. Secondly, the learned judge erred when referring to s 4 of the Act 164 to hold that the disputed marriage was deemed registered (see para 58).

(5) As the deceased had opted to take up the regime of a monogamous marriage and elected to marry the defendant under the CMO, he could not thereafter, pursuant to sub-s 4(1) of the CMO, contract another marriage with the first respondent as his secondary wife during the continuance of his marriage to the appellant. In view thereof, the disputed customary marriage was invalid and void and it followed that the first respondent was not a secondary wife of the deceased nor was she

a lawful widow of the deceased. In the circumstances, the disputed customary marriage, even if it did take place, could never have been validly solemnised (see paras 75 & 78).

(6) With the repeal of the CMO and the enactment of Act 164, in the context of a polygamous marriage contracted before 1 March 1982, the marriage was valid and shall be deemed to be registered under Act 164 by virtue of s 4. With the legislative intent made very clear as provided in s 4, it was untenable to suggest that the law recognised as valid all customary marriages contracted before 1 March 1982 and the marriages were to be deemed registered by Act 164. By virtue of the CMO, the disputed customary marriage was already invalid and void pursuant to the deceased's marriage to the defendant that was first in time and registered under the CMO. Therefore, there was no valid solemnisation of the disputed customary marriage within the meaning of s 4 of Act 164. In the premises, the disputed customary marriage could not be deemed to be registered under Act 164. The court accordingly held, in giving effect to s 5 of the CMO, that the second and the third respondents were not the lawful children and next of kin of the deceased (see paras 94–95).

[Bahasa Malaysia summary

Rayuan semasa berkaitan terutamanya dengan status undang-undang perkahwinan adat responden pertama kepada mendiang Chan Kun Hong ('si mati') yang kononnya diadakan pada atau sekitar bulan Disember 1978 di Kota Kaohsiung, Taiwan ('perkahwinan adat yang dipertikaikan') apabila perkahwinan si mati dengan perayu pada 15 Mac 1969 dan didaftarkan di bawah Ordinan Perkahwinan Sivil No 44 Tahun 1952 ('CMO') masih terpakai. Ia tidak dipertikaikan bahawa si mati kekal berkahwin secara sah dengan perayu semasa hayatnya. Si mati telah meninggal dunia tidak berwasiat pada 30 Januari 2013. Pada 17 Februari 2014, perayu telah diberikan surat kuasa mentadbir ('LA') untuk mentadbir harta pusaka si mati. Perayu atas kapasitinya sebagai pentadbir, kemudiannya mengagihkan aset dan harta si mati kepada perayu dan dua anaknya sebagai benefisiari si mati mengikut Akta Pembahagian 1958 ('Akta 300'). Responden mencabar pemberian LA kepada perayu, antara lain mendakwa responden pertama adalah salah seorang balu si mati yang sah dan beliau serta dua anak perempuannya, yang merupakan responden kedua dan ketiga, adalah anak yang sah dan seterusnya waris si mati. Perayu berhujah bahawa perkahwinan adat yang dipertikaikan tidak pernah diadakan. Perayu seterusnya berhujah bahawa sekiranya perkahwinan adat yang dipertikaikan itu diadakan, ia adalah tidak mengikut undang-undang, terbatal dan tidak sah atas alasan perkahwinannya dengan si mati di bawah CMO. Isu utama yang akan ditentukan dalam rayuan semasa adalah sama ada Mahkamah Tinggi dengan tepat dalam membuat kesimpulan berdasarkan undang-undang dan fakta bahawa perkahwinan adat yang dipertikaikan adalah sah dan sama ada perkahwinan tersebut disifatkan sebagai didaftarkan

di bawah s 4 Akta Membaharui Undang-Undang (Perkahwinan dan Perceraian) 1976 ('Akta 164'). Status anak perempuan responden pertama adalah bergantung kepada keputusan isu ini.

Diputuskan, membenarkan rayuan dengan kos:

(1) Pada pandangan mahkamah, keterangan yang diambil bersama-sama menunjukkan bahawa tidak ada jawapan yang pasti kepada persoalan sama ada Hotel Ambassador ('hotel tersebut') wujud pada tahun 1978. Berdasarkan keadaan, terdapat keraguan sama ada perkahwinan adat yang dipertikaikan telah diadakan di tempat yang didakwa oleh responden. Selain itu, tiada secebis keterangan dokumentari yang menunjukkan bahawa perkahwinan adat yang dipertikaikan telah diadakan (lihat perenggan 35–36).

(2) Dalam kes semasa, hakim yang bijaksana sepatutnya menentukan kebarangkalian atau ketidakmungkinan yang wujud bagi keterangan saksi-saksi responden dan keseluruhan keterangan yang dikemukakan. Nota-nota prosiding menunjukkan terdapat percanggahan dan ketidakselarasan dalam keterangan saksi-saksi responden. Mahkamah mendapati bahawa keterangan yang dikemukakan, yang tidak dipertimbangkan oleh hakim yang bijaksana dalam penghakimannya, tidak secara munasabah membenarkan kesimpulan Yang Arif dicapai. Hakim yang bijaksana tidak mengambil kira kes perayu bahawa kegagalan responden untuk mengemukakan sebarang gambar perkahwinan yang didakwa adalah kerana tidak pernah ada perkahwinan adat yang diupacarakan pada mulanya dan kejadian kebakaran tersebut tidak lebih daripada sekadar percubaan untuk mengelak isu kegagalan untuk mengemukakan sebarang keterangan dokumentari mengenai perkahwinan adat yang dipertikaikan. Mahkamah berpendapat bahawa pertikaian defendan dalam hal ini bukanlah tanpa asas (lihat perenggan 38–39).

(3) Mahkamah berpendapat bahawa terdapat kekurangan penilaian kehakiman terhadap keterangan yang dikemukakan di mahkamah di bawah sama ada perkahwinan adat yang dipertikaikan itu berlaku. Oleh kerana penilaian tersebut tidak penuh dan mencukupi dan tidak diuji terhadap berat kesemua keterangan lain yang dikemukakan dengan betul di hadapan mahkamah, dapatan hakim yang bijaksana bahawa perkahwinan adat yang dipertikaikan tersebut berlaku, ia tidak boleh dikatakan sebagai dicapai oleh hakim yang munasabah (lihat perenggan 48).

(4) Mahkamah berpendapat bahawa kesahihan perkahwinan adat yang dipertikaikan tersebut akan ditentukan oleh CMO. Dalam hal ini, hakim yang bijaksana telah jelas salah dalam dua aspek. Pertama, hakim yang bijaksana telah gagal untuk mempertimbangkan kuasa dan

pengendalian CMO yang memperuntukkan perkahwinan monogami. Kedua, hakim yang bijaksana telah terkhilaf apabila merujuk kepada s 4 Akta 164 dalam memutuskan bahawa perkahwinan yang dipertikaikan tersebut dianggap telah didaftarkan (lihat perenggan 58).

(5) Memandangkan si mati telah memilih untuk menjalani rejim perkahwinan monogami dan memilih untuk mengahwini defendan di bawah CMO, beliau tidak boleh selepas itu, menurut sub-s 4(1) CMO, mengikat perkahwinan lain dengan responden pertama sebagai isteri keduanya semasa meneruskan perkahwinannya dengan perayu. Memandangkan hal itu, perkahwinan adat yang dipertikaikan adalah tidak sah dan terbatal dan berikutan bahawa responden pertama bukanlah isteri kedua si mati dan juga bukan balu yang sah kepada si mati. Dalam keadaan tersebut, perkahwinan adat yang dipertikaikan, walaupun ia berlaku, tidak akan pernah diupacarakan secara sah (lihat perenggan 75 & 78).

(6) Dengan pemansuhan CMO dan penggubalan Akta 164, dalam konteks perkahwinan poligami yang dikontrakkan sebelum 1 Mac 1982, perkahwinan tersebut adalah sah dan hendaklah disifatkan sebagai didaftarkan di bawah Akta 164 menurut s 4. Dengan niat perundangan dibuat dengan sangat jelas seperti yang diperuntukkan dalam s 4, ia adalah tidak boleh dipertahankan untuk mencadangkan bahawa undang-undang yang diiktiraf sebagai sah kesemua perkahwinan adat yang dikontrakkan sebelum 1 Mac 1982 dan perkahwinan tersebut akan dianggap didaftarkan oleh Akta 164. Berdasarkan CMO, perkahwinan adat yang dipertikaikan telah pun tidak sah dan terbatal menurut perkahwinan si mati dengan defendan yang pertama kali dan didaftarkan di bawah CMO. Oleh itu, tidak ada upacara yang sah bagi perkahwinan adat yang dipertikaikan dalam pengertian s 4 Akta 164. Di dalam premis tersebut, perkahwinan adat yang dipertikaikan tidak boleh disifatkan sebagai didaftarkan di bawah Akta 164. Mahkamah sewajarnya memutuskan, dalam memberikan kesan kepada s 5 CMO, bahawa responden kedua dan ketiga bukanlah anak yang sah dan waris si mati (lihat perenggan 94–95).]

Cases referred to

ABDA Airfreight Sdn Bhd v Sistem Penerbangan Malaysia [2001] 3 MLJ 641; [2001] 8 CLJ 1, HC (refd)

Estate of Liu Sinn Min, Decd, Re [1974] 2 MLJ 9b, CA (refd)

Hue Chooi Yin v Chew Pit King [2010] 8 MLRH 819 (refd)

Kausalya a/p M Pathmanathan & Anor v The Legal Representatives of Jamuna a/p Narayanan, deceased & Anor [2014] 2 MLJ 836; [2014] 4 CLJ 148, CA (folld)

Kay, Assignee of Sherwin, v Goodwin (1830) 6 Bing 576 (refd)
Lee Chee Keong v Fadason Holdings Sdn Bhd and other appeals [2017] 3 MLJ 728, CA (refd)
Lee Choon Guan, deceased Lew Ah Lui (f) v Choa Eng Wan & Ors, Re [1935] 1 MLJ 78, HC (refd)
Overseas Investment Pte Ltd v Anthony William O'Brien & Anor [1988] 3 MLJ 332, HC (refd)
Pang Kwee Yin v Teh Sew Wan [2012] 5 MLJ 225; [2012] 3 CLJ 235, HC (refd)
Rohgetana a/p Mayathevan (an infant suing through his father and litigation representative, Mayathevan a/l Mayandi) v Dr Navin Kumar & Ors and other appeals [2017] 4 MLJ 102; [2017] 3 CLJ 311, CA (refd)
STU v The Comptroller of Income Tax [1962] 1 MLJ 220, HC (refd)
Shanmugam s/o S Kanapathy v Pappah d/o Chinniah Nadar [1994] 1 MLJ 144; [1994] 2 CLJ 265, HC (refd)
Tan Ah Bee v Foo Koon Thye and another [1947] 1 MLJ 169 (not folld)
Tengku Besar Zabaidah v Kong Cheng Whum [1969] 2 MLJ 224 (folld)
Wong Fong Yin & Anor v Wong Choi Lin & Anor and another suit [2013] 4 MLJ 82, HC (refd)

Legislation referred to

Christian Marriage Ordinance 1956 (repealed by Law Reform (Marriage and Divorce) Act 1976)
Civil Marriage Ordinance 1940 (repealed by Law Reform (Marriage and Divorce) Act 1976) ss 3, 4, 4(1), (2), 5, 6, 6(a), 33, Part VI
Distribution Act 1958
Interpretation Acts 1948 and 1967 ss 30, 33, 79
Interpretation and General Clauses Ordinance 1948 s 15
Law Reform (Marriage and Divorce) Act 1976 ss 4, 4(1), (2), (3), 33, 109
Penal Code s 494

Appeal from: Suit No WA-22NCVC-321–06 of 2017 (High Court, Kuala Lumpur)

Malik Imtiaz (Dinesh Nandrajog, Henna Nandrajog and Wong Min Yen with him) (Nandrajog) for the appellant.
T Gunaseelan (R Karnan and Razak Kassim with him) (Firdaus Azlina & Co) for the respondents.

Nor Bee Ariffin JCA:

INTRODUCTION

[1] This appeal is primarily concerned with the legal status of the customary

marriage of the first respondent to the late Chan Kun Hong (the deceased) purportedly to have taken place in or around the month of December 1978 at Kaohsiung City, Taiwan (the disputed customary marriage) when the deceased's marriage to the appellant on 15 March 1969 and registered under the Civil Marriage Ordinance No 44 of 1952 ('CMO') was subsisting. It is not disputed that the deceased remained legally married to the appellant during his life time.

[2] The deceased died intestate on 30 January 2013. On 17 February 2014 the appellant was granted letters of administration ('LA') to administer the deceased's estate. The appellant in her capacity as the administratrix, subsequently distributed the deceased's assets and properties to the appellant and her two children as beneficiaries of the deceased in accordance with the Distribution Act 1958 (Act 300). The respondents challenged the grant of the LA to the appellant, claiming among others that the first respondent was one of the lawful widows of the deceased and she and her two daughters, who are the second and third respondents, are the lawful children and next of kin of the deceased.

[3] The appellant contended that the disputed customary marriage never took place. The appellant further contended that even if the disputed customary marriage did take place, it was invalid, null and void by reason of her marriage to the deceased under the CMO.

[4] The main issue to be determined in this appeal is whether the High Court was correct in concluding as a matter of law and fact that the disputed customary marriage was valid and whether the same was deemed to be registered under s 4 of the Law Reform (Marriage and Divorce) Act 1976 (Act 164). The status of the first respondent's daughters is dependent on the outcome of this issue.

THE BACKGROUND FACTS

[5] For ease of reference, we shall refer to parties as they were referred to in the High Court.

[6] Following their marriage, the deceased and the defendant cohabited at No 26, Jalan Awan Kecil Satu, Taman Overseas Union Garden. Jalan Kelang Lama, 58200, Kuala Lumpur. They later moved to No 7, Jalan Awan Kecil 7, Taman Overseas Union Garden, Jalan Kelang Lama, 58200 Kuala Lumpur which was their permanent abode ('OUG house'). There are two children from the deceased's marriage with the defendant. Their first child Chan Hui Ming was born on 25 November 1969 and their second child Chan Kuan Yoong ('DW1') on 20 June 1971.

[7] Sometime in 1974, the deceased and the defendant incorporated a company by the name of Feisco Sdn Bhd ('Feisco'). They were the two directors of Feisco. Feisco acquired a house at Lorang Maarof, Bangsar, Kuala Lumpur ('Bangsar house') on 28 October 2013,

[8] Thereafter sometime in 1975, the deceased with his business partners opened a nightclub in Kuala Lumpur known as 'Ciro'. The first plaintiff, who is a Taiwanese residing in Malaysia, was employed as a singer and entertainer at Ciro since 1975.

[9] The first plaintiffs' case as regards her marriage to the deceased is as follows. It was the deceased's decision to solemnise the marriage in Taiwan. Logistically it was not easy for a large group of her family to be flown over to Malaysia. A small group of family and friends were invited. PW2 and PW4, who are friends of the first plaintiff, were invited. PW2 attended the wedding while PW4 could not make it as she was busy. A customary wedding ceremony of tea offering to the seniors in her family was held. They were the first plaintiff's brother and his wife. There was also an exchange of tea offering between her and the deceased. Photographs were taken of the wedding ceremony. The photographs, dress that she wore, the invitation cards, memorabilia and many of her other keepsake possession were all kept at her brother's house in Guanming Village, Taitung City, Taiwan which she considered as her family home. The photographs and all her possessions were destroyed in a fire tragedy that occurred at her brother's house in 1987, the reason why she did not have any documents related to the said marriage.

[10] After the marriage, they spent about a year and a half in Taiwan and the deceased was all the while with her. The deceased and the first plaintiff returned to Malaysia sometime in early 1981. They eventually resided at the Bangsar house in November 2013 after Feisco purchased it in October 2013.

[11] The plaintiffs claimed that the defendant had full knowledge of the second family for these reasons. The plaintiffs had lived at the Bangsar Home from 2013 until 27 June 2017 when they agreed to give vacant possession to Feisco vide a consent order dated 30 March 2017 in an action taken by Feisco claiming for vacant possession of the Bangsar house on 2 March 2017 vide Originating Summons No WA-24 NCVC-324–03 of 2017. The deceased's nephew Chan Kuan Chai was taking care of the renovation of the Bangsar house. He would have known about them. Chan Kuan Chai's wife, Joanne, was very close to the defendant. Presumably the defendant then would have known about them. Their family used to attend a lot of official functions as the deceased was a prominent businessman.

[12] The plaintiffs claimed that the defendant had moved and settled in the

A United Kingdom around 1981 with her two children for their educational purposes and returned permanently to Malaysia in or around 2003–2004. During the period when the defendant was away, the deceased had lived with the first plaintiff and there was no secret that she was his wife.

B **[13]** The plaintiffs further contended that as the disputed customary marriage between the deceased and the first plaintiff was solemnized under the Chinese custom prior to 1 March 1982, which was the date on which the Law Reform (Marriage and Divorce) Act 1976 came into force ('Act 164'), the disputed customary marriage was deemed to be registered under s 4 of Act 164.
C

[14] The plaintiffs claimed that defendant in the application for the LA, did not disclose the existence and/or the rights of the plaintiffs in the estate of the deceased. Therefore the defendant had committed fraud against the court and
D the plaintiffs.

[15] On 15 December 2016, the plaintiffs filed a writ action against the defendant at the Kuala Lumpur High Court under Suit No WA-22NCVC-803–12 of 2016 claiming part of the estate of the deceased
E from the defendant as the administratrix. Suit 803 was however withdrawn on 27 March 2017.

[16] On 17 April 2017, the plaintiffs filed a citation at the Kuala Lumpur
F High Court under Originating Summons No WA-31NCVC-627–04 of 2017 for the defendant to deposit the grant of the LA at the Registry of the Kuala Lumpur High Court. The defendant had done so on 30 May 2017.

[17] Thereafter, the plaintiffs filed Suit No WA-22NCVC-321–06 of 2017
G on 23 June 2017 against the defendant and sought:

(a) a declaration that the first plaintiff was one of the lawful widows of the deceased;

(b) a declaration that the second and third plaintiffs were the lawful children
H and next of kin of the deceased;

(c) an order that the grant of LA to the defendant be set aside;

(d) an order that the defendant produce an inventory or list of items relating to the administration of the deceased's estate and effects from the date of
I the grant of LA;

(e) an order to appoint the third plaintiff and one of the children of the defendant to jointly administer the deceased's estate; and

(f) an order for the newly appointed administrators to take steps to distribute the deceased's estate to the respective beneficiaries pursuant to Act 300.

[18] The defendant contended that she had never known the first plaintiff other than in her capacity as a singer and entertainer at Ciro. The deceased never mentioned the existence of the plaintiffs, not until January 2013, a few days before his death when the deceased confessed to DW1 that he had an extra-marital affair with the first plaintiff and that the second and the third plaintiffs were born from the relationship. The deceased had requested for the second and third plaintiffs to be allowed to attend his funeral and to be included in the obituary.

[19] DW1 fulfilled the deceased's wishes. The second and third plaintiffs attended the deceased's funeral and their names were included in the deceased's obituary as the deceased's daughters along with DW1's elder sister.

[20] The defendant asserted that she and the deceased lived and resided together at the OUG house at all material times. She claimed that the disputed customary marriage had not taken place because the deceased's passport for the relevant years did not show that the deceased travelled to Taiwan in 1978. Added to that, the defendant contended that the Ambassador Hotel was not in existence in 1978.

[21] As regards the averment that the defendant was away in the United Kingdom for a long duration, the defendant averred that she visited her children in the United Kingdom approximately two to three times a year and would stay with them for a month or so. The deceased and the defendant would sometime make their trips to the United Kingdom together.

[22] The defendant said that the plaintiffs were not named as beneficiaries in the LA because the first plaintiff was a stranger and had no relation with the deceased while the second and third plaintiffs are illegitimate children. They are not entitled to be beneficiaries under Act 300.

[23] Apart from her stand that the disputed customary marriage had never taken place, the defendant also contended that if at all there was one, it was invalid, null and void because the deceased had contracted a monogamous marriage under the CMO.

THE HIGH COURT

[24] As to whether the Ambassador Hotel existed in 1978, the defendant contended that the hotel was not there because according to DW1, his search

at the website of the Department of Commerce of Taiwan showed that the earliest the hotel could have operated was in 1981.

[25] The third plaintiff on the other hand testified that she went to Kaohsiung to visit the Ambassador Hotel. From her research at the Kaohsiung Public Library and having referred to two architectural books found therein, the hotel was built between 1977 to 1981.

[26] The learned judge found on the balance of probabilities that the customary marriage ceremony had taken place at the Ambassador Hotel in 1978. The learned judge agreed with the plaintiffs that the dispute customary marriage was valid and by virtue of s 4 of Act 164, the marriage was deemed to be registered. The High Court made the following orders:

(a) a declaration that the first plaintiff is one of the lawful widows of the deceased;

(b) a declaration that the second and the third plaintiffs are the lawful children and next of kin of the deceased;

(c) since there was no evidence of fraud, the plaintiffs' prayers for an order to produce an inventory or list of items for the grant of LA and to appoint the third plaintiff in paras 26(e) and (f) of the statement of the claim are not allowed; and

(d) the grant of LA was upheld but the defendant in her capacity as the administratrix of the estate of the deceased is ordered to take further steps to hand over the estate and effects of the deceased to the respective beneficiaries pursuant to Act 300.

THE APPEAL

[27] The defendant appealed against part of the decision of the High Court that allowed a declaration that the first plaintiff is one of the lawful widows of the deceased, a declaration that the second and the third plaintiffs are the lawful children and next of kin of the deceased and ordered the defendant to take further steps to hand over the estate and effects of the deceased to the respective beneficiaries pursuant to Act 300.

[28] We unanimously allowed the appeal.

OUR DECISION

[29] This appeal raised questions of fact and law. The factual points relate to whether the disputed customary marriage had taken place. The legal points

relate to whether the disputed customary marriage, if it had taken place, is accorded recognition in law

Whether the marriage solemnisation had taken place?

[30] It is apparent that the learned judge was persuaded by the plaintiffs' argument that since the marriage was solemnised under the law, custom and usage of the parties of the marriage prior to 1 March 1982, thus the disputed marriage, being a valid customary marriage, was deemed to be registered under s 4 of Act 164. In other words, the validity of the disputed customary marriage was determined based on the personal laws of the parties as it had taken place prior to 1 March 1976.

[31] The plaintiffs premised their contention upon the proposition that a Chinese man may have as many wives as he may be disposed of, usually he has a principal wife and may have several secondary wives as well (*Tan Ah Bee v Foo Koon Thye and another* [1947] 1 MLJ 169). The first plaintiff knew that when she claimed to have married the deceased in December 1978, the deceased was already married to the defendant.

[32] The existence of the disputed customary marriage is a question of fact. The burden is on the plaintiffs to prove the same on a balance of probabilities.

[33] We cautioned ourselves that as the appellate court, we do not intervene on findings of facts by the trial court unless the trial court is plainly wrong in the apprehension of the law and the facts.

[34] It is quite apparent that the only reason for concluding that the disputed customary marriage had taken place is that the learned judge accepted the direct evidence of the first plaintiff and PW2 and PW4 (who did not attend the wedding and who agreed that she would not know whether actual ceremony took place or not) and the third plaintiff (with regard to the existence of the Ambassador Hotel) in concluding that the customary marriage ceremony had taken place at the Ambassador Hotel in 1978. Can the learned judge's judgment be justified on evidence?

[35] The existence of the Ambassador Hotel in 1978 remained an issue. Despite the learned judge having rejected DW1's evidence that the said hotel was only built in the year 1981, stating that it takes more than a computer printout to disprove that the hotel did not exist in December 1978, His Lordship failed to state the basis for his ruling that the said hotel was in existence in 1978 as the evidence of the second and third plaintiffs and documentary evidence they produced showed that the year of the actual existence of the said hotel was shrouded with uncertainty. The third plaintiff

even admitted in examination in chief that the documents referred to by the defendant and the information she had gathered were contradicting each other and simply unreliable. A book known as 'A Guide to Puo-Fuon Tsai's Architecture' referred to by the third plaintiff stated that the project duration of Ambassador Hotel in Kaohsiung was between the year 1977 to 1981. Another book known as 'The Architectural Beauty of Kaohsiung 1683–2004' mentioned that the Ambassador Hotel in Kaohsiung was built at the end of 1970's. The third plaintiff visited the Ambassador Hotel and met with one Miss Sabrina from the hotel, trying to verify when the hotel was built but did not get cooperation from her. However, in re-examination, the third plaintiff said that the said hotel was built at the end of 1970s. Notably, the second plaintiff's evidence in cross-examination showed that the document printed by her confirmed that the Ambassador Hotel was officially opened in 1981. The exact date and year of the establishment of Ambassador Hotel most probably can be provided by the hotel itself but no one from Hotel Ambassador was called to testify. In our view, the evidence taken together show that there is no definite answer to the question of whether the said hotel was there in 1978. As things stand, there is doubt whether the disputed customary marriage was solemnised at the venue alleged by the plaintiffs.

[36] Additionally, there is not a shred of documentary evidence to show that the disputed customary marriage had taken place. No marriage certificate registered either in Taiwan or Malaysia, photographs of the wedding ceremony, wedding invitation cards or spousal visa was placed before the court. The question which must be asked is whether there was truth in the evidence of the first plaintiff as regards the alleged fire tragedy and the evidence of PW2 that she had taken a photograph but had misplaced it. PW4's evidence showed that she was shown some photographs of the wedding by the first plaintiff in KL but the first plaintiff had taken them back. Her evidence contradicted the first plaintiff's evidence that she did not take with her all the photographs and they were all kept at her brother's house because she was too busy to take them back to Malaysia in 1981. The learned counsel for the plaintiffs conceded that there was no photographs in the bundles before the court.

[37] We are mindful of the decided cases which held that oral evidence is by itself sufficient to prove a fact in the absence of documentary evidence to support it and much depends on the facts and circumstances of the case (see *ABDA Airfreight Sdn Bhd v Sistem Penerbangan Malaysia* [2001] 3 MLJ 641; [2001] 8 CLJ 1, *STU v The Comptroller of Income Tax* [1962] 1 MLJ 220 at p 221, *Rohgetana a/p Mayathevan (an infant suing through his father and litigation representative, Mayathevan a/l Mayandi) v Dr Navin Kumar & Ors and other appeals* [2017] 4 MLJ 102; [2017] 3 CLJ 311, *Overseas Investment Pte Ltd v Anthony William O'Brien & Anor* [1988] 3 MLJ 332).

[38] In the present case, the learned judge should have determined the inherent probability or improbability of the evidence of the plaintiffs' witnesses and the totality of the evidence adduced. The notes of proceedings show that there are contradictions and inconsistencies in the evidence of the plaintiffs' witnesses. We find that the evidence adduced, which was not considered by the learned judge in his judgement, did not reasonably allow for the conclusion His Lordship had arrived.

[39] The learned judge did not consider the defendant's case that the plaintiffs' failure to produce any photographs of the alleged wedding was because there was never any customary marriage solemnised to begin with and that the fire incident was nothing more than just an attempt to evade the issue of failure to produce any documentary evidence of the disputed customary marriage. We think that the defendant's contention in this respect is not without basis.

[40] Firstly, as observed by the learned judge, the fire incident was not pleaded. It is trite law that parties are bound by their pleadings. The fire incident is in our view a material fact which should have been pleaded. The fire incident therefore is not a reason for failing to adduce documentary evidence of the disputed customary marriage.

[41] Secondly, the issue of fire appeared to be an afterthought. There were conflicting statements on the first plaintiffs whereabout when the fire took place. In her evidence, she said that she was in Malaysia when the fire took place. She was informed by her brother of the fire. However, in her sworn statement dated 19 May 2017, she stated that she lived with her brother when the fire took place on 16 December 1987 at No 43 which was inconsistent with her pleadings and testimonies that she moved to Malaysia in early 1981. She eventually said that she was in Malaysia.

[42] Thirdly, a translation of a news report by Taiwan News dated 17 December 1987 adduced by the plaintiffs showed that all wooden houses destroyed by the fire were dormitories of the workers of Taitung sugar factory. The first plaintiff agreed that the fire destroyed the houses of the workers but insisted that her brother's house was burnt as well. The news report did not make any mention of fire engulfing houses including her family house.

[43] Next, the first plaintiff testified that she travelled back from Kuala Lumpur to Taiwan for the wedding. She agreed that there was no travel document or any passport chop to show that she had travelled back to Taiwan in December 1978.

[44] The issue on whether the deceased had travelled to Taiwan in December

1978 to get married is crucial, something which the learned judge had overlooked. There cannot be the wedding if the deceased did not undertake the travel, whether the Ambassador Hotel was in existence or not.

[45] The deceased's passport, which was a Part B document, showed that it was valid for the years 1975 until 1980. There were no blank pages, most pages had stamps on them. The last entry showed the date 20 October 1978 in Singapore. There was no indication or stamp that the deceased had travelled to and from Taiwan in December 1978. We are of the view that the learned judge should have made a finding of fact as to whether the deceased did travel to Taiwan in December 1978 because firstly, the first plaintiff testified that she did not have proof that he had travelled but insisted that he did so. Secondly, the corner of the passport had been cut off, there was a perforation which indicate that the passport had been cancelled and the deceased could have obtained a new passport to enable him to travel to Taiwan in December 1978 (after 20 October 1978). However, a new passport, if he had obtained one, would be for the period of 1980 onwards. Thirdly, DW1, although he was only eight years of age in December 1978, testified that his father was always there with his family.

[46] The first plaintiff is not a permanent resident of this country. She was on a social visit pass which would expire every six months upon the first plaintiffs entry. The visa issued was dated 9 November 2017 and expired on 8 May 2018. It is obvious that she was not in possession of a spousal visa. One wonders why she was not in possession of a spousal visa all this while if she is the lawful second wife of the deceased since December 1978.

[47] Evidence had it that none of the deceased's family members was present at the disputed customary marriage solemnisation. Even if the deceased's parents had passed away, there was no elder of the family representing the deceased for the tea ceremony. The first plaintiff also admitted that she did not meet and/or visited the family members of the deceased upon her return to Malaysia to receive their blessings.

[48] Based on the foregoing, we take the view that there appears to be insufficient judicial appreciation of the evidence adduced in the court below as to whether the disputed customary marriage did take place. As the evaluation is not full and adequate and not tested against the weight of all other evidence properly placed before the court, the finding of the learned judge that the disputed customary marriage did take place, cannot be said to be one which a reasonable judge could have reached (*Lee Chee Keong v Fadason Holdings Sdn Bhd and other appeals* [2017] 3 MLJ 728 (CA)).

[49] Notwithstanding our view that the plaintiff had failed to prove that the

disputed customary marriage had taken place, we shall proceed to address the legal points on the assumption that the disputed customary marriage had taken place. We see the need to conclusively determine the status of the disputed customary marriage in view of the issue of the legitimacy of the second and third defendants.

Should the disputed customary marriage be accorded recognition in law?

[50] The plaintiffs relied on the case of *Re Lee Choon Guan, deceased Lew Ah Lui (f) v Choa Eng Wan & Ors* [1935] 1 MLJ 78 and *Tan Ah Bee* and in *Wong Fong Yin & Anor v Wong Choi Lin & Anor and another suit* [2013] 4 MLJ 82 and *Kausalya a/p M Pathmanathan & Anor v The Legal Representatives of Jamuna a/p Narayanan, deceased & Anor* [2014] 2 MLJ 836; [2014] 4 CLJ 148, among others, to prove that the disputed customary marriage should be given recognition in law.

[51] The learned judge found that the two cases, namely, *Re Lee Choon Guan, deceased* and *Tan Ah Bee*, though archaic as they are, are representative of the present legal position. The learned judge made the following findings of fact as to why he thinks the disputed customary marriage had met all the requirements laid down in the two cases and therefore it should be recognised as a valid marriage.

[52] The proposition propounded in both *Re Lee Choon Guan*, and *Tan Ah Bee*, is that in order to prove a Chinese secondary marriage, though no ceremony need be proved, it is necessary to prove: (a) long continued cohabitation; (b) an intention to form a permanent union; and (c) repute of marriage. Recognition by the husband's family is said to be one of the strongest forms of reputation of marriage.

[53] As regards the first requirement, since the Bangsar house was at the material time in the name of Feisco, and the defendant is the director since 21 March 1974, the appellant must have known of the existence of the said house in 2013. The learned judge accepted the evidence of the plaintiffs' witnesses that the deceased had stayed with the plaintiffs at the Bangsar house as a family. Although the deceased spent more time at the OUG's house after DW1 and her sister came back from overseas, the deceased had not abandoned the plaintiffs. There was therefore evidence of a long-continued cohabitation.

[54] On the second requirement, the learned judge held that the fact that the deceased had not abandoned the plaintiffs indicated an intention to form a permanent union. The disputed customary marriage lasted for more than 30 years with no evidence of any permanent separation until the demise of the deceased. In *Wong Fong Yin*, the marital union lasted for 29 years.

[55] As regards the third requirement, the learned judge accepted PW3's evidence that the deceased had attended official functions with her mother and the deceased. The birth certificates of the second and third plaintiffs showed that the first plaintiff and the deceased are their parents. Their names appeared in the obituary published in *The Star* newspaper as the daughters of the deceased alongside DW1's sister. The learned judge went further to say that if indeed the second and the third plaintiffs were the illegitimate children of the deceased, he did not think that their names would have appeared in the obituary. The learned judge concluded that there was evidence of repute of a marriage and some recognition of status.

[56] A point to note is that in coming to the conclusion that he did, the learned judge did not canvass the most critical issue in this disputed customary marriage, ie the legal effect of the CMO.

[57] There was no reason given why the CMO which was the governing law of the deceased's marriage, was completely left out despite the learned judge being fully appraised of the contention of the defendant that the disputed customary marriage was invalid, null and/or void under the CMO and Act 164, citing in support thereof the case of *Shanmugam s/o S Kanapathy v Pappah d/o Chinniah Nadar* [1994] 1 MLJ 144; [1994] 2 CLJ 265, *Hue Chooi Yin v Chew Pit King* [2010] 8 MLRH 819, *Pang Kwee Yin v Teh Sew Wan* [2012] 5 MLJ 225; [2012] 3 CLJ 235 and *Re Estate of Liu Sinn Min, Decd* [1974] 2 MLJ 9b among others.

[58] At the outset, we state our view that the validity of the disputed customary marriage is to be determined by the CMO. In this regard, the learned judge was plainly wrong in two respects. Firstly, the learned judge had failed to consider the force and operability of the CMO which provides for monogamous marriages. Secondly, when referring to s 4 of Act 164 to hold that the disputed marriage was deemed registered.

The disputed customary marriage is invalid, null and/or void pursuant to the CMO

[59] It is important to emphasise that the CMO was enacted to provide for monogamous marriage. This is clearly encapsulated in its long title which provides:

> An Ordinance to provide for the solemnization and registration of monogamous marriage by Registrars of Marriages.

[60] Section 3 of the CMO makes provisions for the validity of monogamous marriages and it reads:

3(1) All marriages solemnized in accordance with the provisions of this Ordinance shall be good and valid in law for all purposes whatsoever.

(2) No marriage one of the parties to which professes the religion of Islam shall be solemnized or registered under this Ordinance.

[61] The fact that the CMO caters specifically for monogamous marriage is provided for in s 4. It provides:

4(1) A male person married in accordance with provisions of this Ordinance, shall be incapable, during the continuance of such marriage, of contracting a valid marriage with any third person, whether as principal or secondary wife.

(2) A female person married in accordance with the provisions of this Ordinance, shall be incapable, during the continuance of such marriage, of contracting a valid marriage with any third person either as his principal or secondary wife.

[62] Section 5 relates to disabilities and the effects of union other than as provided under CMO. It provides:

5(1) If any male person lawfully married under this Ordinance shall thereafter during the continuance of such marriage contract a union with a woman which but for such marriage would confer rights of succession or inheritance upon such woman or upon the issue of such union, no issue of such union shall be legitimate or have any right of inheritance in or succession to the estate of such male person, and no such woman shall have any such right by reason of the death intestate of such male person.

[63] Section 6 makes provision on continuance of marriage. It provides:

Every marriage duly solemnized under this Ordinance shall continue until dissolved in any of the following manners:

(a) by the death of one of the parties; or

(b) by order of a Court of competent jurisdiction; or

(c) by a declaration made by a Court of competent jurisdiction that the marriage is null or void.

[64] The effect of s 4 of the CMO was considered in a number of case law. In *Shanmugam s/o S Kanapathy,* a case on succession claims. The plaintiff claimed a declaration that he was the only legitimate child of S Kanapathy s/o Sinnathamby, deceased (deceased), who died intestate. As such, he was the sole beneficiary of the estate of the deceased. As regards the defendant's case, the facts showed that she had married one Raman s/o Tanakody on 16 November 1966 in Kinta, Perak pursuant to the CMO. However, the marriage was not consummated with the result that it was held null and void. The marriage was dissolved by the High Court, Ipoh on 19 April 1983. The defendant claimed

that she had married the deceased according to Hindu customary rites on 6 September 1967 according to Hindu customary rites and there were three children of this marriage. Therefore the defendant alleged that she was the lawful widow of the deceased whom she married on 6 August 1967. On the defendant's claim, Edgar Joseph Jr SCJ held at pp 271–272 that the difficulty faced by the defendant was ss 4(2) and 6 of the CMO which was in force at the material time and went on to say:

> I must therefore further declare that the defendant is not the lawful widow and relict of the deceased and that, consequently, even if her three children are the children of the deceased they are not his legitimate children so that neither the defendant nor any of her children are entitled to succeed to the estate of the deceased who died intestate.

[65] In *Re Estate of Liu Sinn Minn*, the facts are similar to the present case. Liu Sinn Min (the deceased) married are similar to the Ho June Chin in Singapore under the Civil Marriage Ordinance 1940. There were five children of this marriage. 18 years after the marriage, Liu Sinn Minn contracted a union with another woman, Chai Siew Hong. There were three children from this union. Liu Sinn Minn died intestate. Ho June Chin petitioned for letters of administration. Chai Siew Hong filed a caveat claiming that her three children from her union with the deceased were the lawful children of the deceased and were entitled to share in the estate of the deceased. Ho June Chin and her five children commenced the action against Chai Siew Hong's three children for a declaration whether the defendants are entitled to inherit the estate or part thereof of the estate of the deceased.

[66] Section 4 of the Civil Marriage Ordinance 1940 of Singapore is similar to our s 4 of the CMO. Wee Chong Sin CJ said as follows 21 on the operation of the said provision at pp 145 and 147:

> Although as a Chinese by race his personal law entitled him to practise polygamy, the operation of s 4(1) of the Civil Marriage Ordinance made him 'incapable, during the continuance of such marriage, of contracting a valid marriage with a third person, whether as principal or secondary wife'.
>
> The second contention urged on behalf of the defendants is that the trial Judge was wrong in law in holding that the deceased, who voluntarily elected to marry under a law providing for monogamous marriage, must be deemed to have abandoned or renounced his right to enter into a matrimonial customary law. We reject this contention too. Section 4(1) of the then Civil Marriage Ordinance under which the deceased married his wife specifically provides that 'a male person married in accordance with the provisions of this Ordinance shall be incapable, during the continuance of such marriage, of contracting a valid marriage with any third person, whether as principal or secondary wife'.

[67] *Shanmugam s/o S Kanapathy* and *Re Estate of Liu Sinn Minn* were

referred to in *Hue Chooi Yin*. Yeoh Wee Siam JC (as she then was) in *Hue Chooi Yin* and in *Pang Kwee Yin* specifically dealt with the provisions of the CMO we had alluded to.

[68] The facts in *Hue Chooi Yin* also bears resemblance to the present case. The petitioner alleged that she married the respondent's father, the late Chew Choon Ming ('CCM'), on 5 May 1979 according to Chinese Customary rites. The petitioner alleged that she and CCM lived together and cohabited since the date of the alleged marriage in 1979 and they had two children. The alleged customary marriage was neither registered as a marriage under the CMO or Act 164. At the time of the alleged customary marriage, CCM was married to the respondent's mother Sao Poi Eng and they had two children, the respondent and his sister, Chew Mei Lian. Sao Poi Eng died on 8 March 1997. CCM died on 5 June 2000. The petitioner sought declarations that: (a) she was the lawful wife of CCM as the earlier marriage between CCM and Sao Poi Eng on the demise of Sao Poi Eng on 8 March 1997 was dissolved by virtue of s 6(a) of the CMO and by virtue of the fact that CCM and the petitioner had cohabited, had two children and had lived together as husband and wife for more than 22 years until the death of CCM; and (b) that the customary marriage celebrated on 5 May 1979 may be declared to be valid and subsisting marriage for all intent and purposes.

[69] The learned JC (as she then was) found that there was no such customary marriage between the petitioner and CCM on 5 May 1979 and therefore there was no marriage in the first place. The learned JC went on further to hold:

> Assuming that there was a customary marriage between the petitioner and CCM on 5 May 1979, the customary marriage would not be valid or registrable under the CMO at the material time because the late CCM had no legal capacity to marry a second time. This is so because on 5 May 1979, the late CCM was still married to the late Soo Poi Eng. The CMO only provides for and recognizes monogamous marriages ...
>
> From the above, it is clear that CCM had contracted a statutory marriage with Soo Poi Eng under the CMO and had voluntarily elected to marry under a law providing CCM must therefore be deemed to have abandoned or renounced his right to enter into a matrimonial relationship with another woman, which used to be open to him as a Chinese, in accordance with Chinese customary law. Therefore, CCM was legally incapacitated to enter into another marriage under Chinese customary rites. There is no way that CCM could have married the Petitioner, whether by the alleged customary marriage or by registering such marriage under the CMO. For him to do so, would be committing the offences under s 33 of the CMO and s 494 of the Penal Code.

[70] The cases cited above clearly showed that if the male person had elected

to marry under the CMO, then he is incapable, during the continuance of such marriage, of contracting a valid marriage with any third person, whether as principal or secondary wife. This is notwithstanding the fact that as a Chinese by race, his personal law entitled him to practise polygamy. That in our view, is the position of the law.

[71] In *Kausalya alp M Pathmanathan*, the main issue before the Court of Appeal was on the challenge of the validity of the marriage of the deceased with the mother of the plaintiffs, PW2. The plaintiffs contended that while the deceased was married to the first defendant, the deceased married their mother and took her as his second wife. The Court of Appeal decided that issues were two-fold, namely, whether Hindu law recognises polygamous marriages, the deceased and PW2 being Hindus, and whether the deceased and the plaintiffs' mother (PW2) went through a marriage in accordance with Hindu custom. Hishamudin Mohd Yunus JCA delivering the judgment of the court held:

> [19] It is to be noted that the alleged marriage took place in 1976. Therefore, this alleged marriage was solemnised prior to the enactment of the Law Reform (Marriage and Divorce) Act 1976 (Act 164) (the Act), which made polygamous marriages solemnised after 1 March 1982 void. Prior to the coming into force of the Act, the validity of a marriage was determined based on the personal laws of the parties to the marriage. That being the case, since both the deceased and PW2 professed the Hindu religion, therefore Hindu law would apply in determining whether their marriage was valid or otherwise.

[72] We accept the above proposition of law. However, it must be borne in mind that in *Kausalya alp M Pathmanathan*, the first marriage contracted between the deceased and the first defendant was pursuant to the Hindu law. There was no issue of the first marriage between the deceased and the first defendant being governed by the CMO. Likewise in *Wong Fang Yin*, there was no issue of any marriage registered under the CMO.

[73] In this regard, we agreed with learned counsel for the defendant that before 1 March 1982, there were two regimes of marriages, namely, polygamous and monogamous marriages. Under the CMO, the marriage was monogamous marriage. Marriages contracted under the personal law, religion, custom or usage was polygamous. Vernon Ong J (as he then was) in *Wong Fang Yin*, observed that under Act 164, marriages solemnised prior to 1 March 1982 are recognised and these included marriages solemnised in accordance with the provision of statutes such as the Christian Marriage Ordinance 1956 and the CMO, Chinese customary marriages, Hindu customary marriages and common law marriages.

[74] Act 164 came into force on 1 March 1982. It repealed the CMO 1952 in full as on that date. The disputed customary marriage took place in

December 1978. Thus, the CMO was still in force when the disputed customary marriage took place.

[75] It follows that as the deceased had opted to take up the regime of a monogamous marriage and elected to marry the defendant under the CMO, he could not thereafter, pursuant to sub-s 4(1) of the CMO, contract another marriage with the first plaintiff as his secondary wife during the continuance of his marriage to the defendant. In view thereof, the disputed customary marriage is invalid and void and it follows that the first plaintiff is not a secondary wife of the deceased nor is she a lawful widow of the deceased.

[76] The learned judge should have applied the provisions of the CMO instead of relying on the principles in *Lee Choon Guan, Deceased* and *Tan Ah Bee* which are cases decided in 1935 and 1947, well before the enactment of CMO in 1952 and Act 164 in 1982. The two 'archaic' cases cannot apply to the present case.

[77] It would obviously have made a lot of difference if the deceased had not opted to marry the defendant under the CMO. He then would not have been constrained as a Chinese man, to have as many wives as he may be disposed of. But with the election that the deceased had made to contract a marriage with the defendant, he 'must be deemed to have abandoned or renounced his right to enter into a matrimonial relationship with another woman which was open to him as a Chinese in accordance with Chinese customary law' *(Re Estate of Liu Sinn Minn*). As the learned JC correctly observed in *Hui Chooi Yin* 'With the CMO, and later the LRA tightly in force, gone are the days when a Chinese couple can opt out of the legal regime and live together under their personal or customary law and expect the courts to apply the statutory law to recognise, confer legal status on, or validate such customary unions'. And to reiterate the decision of the Court of Appeal in *Re Estate of Liu Sinn Minn* although as a Chinese by race his personal law entitled him to practise polygamy, the operation of s 4(1) of the Civil Marriage Ordinance made him 'incapable, during the continuance of such marriage, of contracting a valid marriage with any third person, whether as principal or secondary wife'.

[78] In the circumstances, the disputed customary marriage, even if it did take place, can never have been validly solemnised.

[79] We agreed with learned counsel for the defendant that s 4 of Act 164 does not save the disputed customary marriage as the same was already invalid and void from the start.

[80] Section 4 of Act 164 reads:

A 4(1) Nothing in this Act shall affect the validity of any marriage solemnized under any law, religion, custom or usage prior to the appointed date.

(2) Such marriage, *if valid under the law, religion, custom or usage under which it was solemnized.* shall be deemed to be registered under this Act.

B (3) Every such marriage, unless void under the law, religion, custom or usage under which it was solemnized, shall continue until dissolved —

(a) by the death of one of the parties;

(b) by order of a court of competent jurisdiction; or

C (c) by a decree of nullity made by a court of competent jurisdiction. (Emphasis added.)

[81] It is crucial to note that for a marriage to be deemed registered under s 4 of Act 164, the marriage must be valid under the law, religion, custom or usage D under which it was solemnised. The disputed customary marriage can never be valid simply because by contracting the same, the deceased shall be deemed to commit the offence of marrying again during the lifetime of the defendant within the meaning of s 494 of the Penal Code.

E

[82] Part VI of the Ordinance provides for penalties for offences committed thereunder. Section 33 deals with certain purported marriages to be offences under s 494 of the Penal Code. It reads:

F 33(1) Any person, married in accordance with the provisions of this Ordinance, who during the continuance of such marriage purports to contract a valid marriage with a third person under any law, custom, religion or usage shall be deemed to commit the offence of marrying again during the lifetime of husband or wife, as the case may be, within the meaning of section 494 of the Penal Code.

G (2) Any person who has contracted a valid marriage under any law, religion, custom or usage and who during the continuance of such marriage purports to contract a marriage under this Ordinance shall be deemed to have committed the offence of marrying again during the lifetime of husband or wife, as the case may be, within the meaning of section 494 of the Penal Code:

H Provided that it shall be lawful for any person who has only one wife or husband, as the case may be, through a valid marriage contracted under any law, religion, custom or usage to marry that wife or husband, as the case may be, under the provisions of this Ordinance unless such marriage would be contrary to any other provision of this Ordinance.

I **[83]** Section 494 reads:

494 Marrying again during the lifetime of husband or wife

Whoever, having a husband or wife living, marries in any case in which such marriage is void by reason of its taking place during the life of such husband or wife

and whether such marriage has taken place within Malaysia or outside Malaysia, shall be punished with imprisonment for a term which may extend to seven years, and shall also be liable to fine.

The effect of s 4 of Act 164

[84] Learned counsel for the plaintiff submitted before us on the effect of s 4 of Act 164 and the repeal of the CMO which is summarised as follows. Subsection 4(1) of Act 164 recognises any marriage solemnised under any law, religion, custom or usage prior to 1 March 1982. As the deceased and the first plaintiff were married under the custom of the Chinese, therefore the disputed customary marriage must therefore be deemed valid pursuant to sub-s 4(2). With the repeal of the CMO and the enactment of Act 164, polygamous marriage contracted before 1 March 1982 are valid. Further, by virtue of sub-s 4(3), every marriage shall continue unless void under the law, religion, custom or usage of which it was solemnised.

[85] It was further submitted that with the enactment of Act 164, the CMO is no longer relevant and ought to be deemed never passed by Parliament. The case of *Tengku Besar Zabaidah v Kong Cheng Whum* [1969] 2 MLJ 224 was cited in support of the proposition on the effect of a repeal of a statute.

[86] Learned counsel for the plaintiffs also made a brief mention of s 33 of Act 164 which provides for voluntary registration of marriages previously solemnised under religion or custom. It was submitted that s 33 further establishes that the previous polygamous marriages are deemed to be valid.

[87] We agree in general with the argument on the construction of s 4 and the decision in *Tengku Besar Zabaidah* but we wish to point out the following.

[88] It is common knowledge that when a statute is repealed, there would be a necessity to provide for savings and transitional provisions. Learned author GC Thornton in his book *Legislative Drafting* (4th Ed, 2007) at p 383, described a savings and transitional provisions as follows:

> The function of a savings provision in legislation is to preserve or 'save' a law, a right, a privilege or an obligation which would otherwise be repealed or cease to have effect.
>
> The function of a transitional provision is to make special provision for the application of legislation to the circumstances which exist at the time when that legislation comes into force.

[89] On savings provision, the learned author at pp 387–388 further said that a savings provision is used to preserve what already exists; it cannot create

new rights or obligations. Such a savings provision may be contained in interpretation legislation or may be specifically included.

[90] The repeal of the whole of the CMO took effect on 1 March 1982. Section 109 of Act 164 that dealt with the repeal of the written laws, including the whole CMO, contains no specific savings provisions therein but we can see one in s 4 of Act 164. The said provision preserved or saved any marriage validly solemnised under any law, religion, custom or usage prior to 1 March 1982.

[91] The Interpretation Acts 1948 and 1967 (Act 388) also contains provisions of general application on repeal. We reproduce below the provisions of ss 30 and 33 of Act 388:

> 30 Matters not affected by repeal
>
> (1) The repeal of a written law in whole or in part shall not —
>
> (a) affect the previous operation of the repealed law or anything duly done or suffered thereunder; or
>
> (b) affect any right, privilege, obligation or liability acquired, accrued or incurred under the repealed law; or
>
> (c) affect any penalty, forfeiture or punishment incurred in respect of any offence committed under the repealed law;
>
> (d) affect any investigation, legal proceeding or remedy in respect of any such right, privilege, obligation, liability, penalty, forfeiture or punishment,and any such investigation, legal proceeding or remedy may be instituted, continued or enforced, and any such penalty, forfeiture or punishment may be imposed, as if the repealing law had not been made.
>
> (2) Without prejudice to the generality of subsection (1) —
>
> (a) the repeal of a written law which adopts, extends or applies another written law shall not —
>
> (i) invalidate the adoption, extension or application; or
>
> (ii) prejudicially affect the continued operation of the adopted, extended or applied law; and
>
> (b) the repeal of a written law which amends another written law shall not —
>
> (i) invalidate the amendments made by the repealed law; or
>
> (ii) prejudicially affect the continued operation of that other law as amended.
>
> 33. Specific transitional or saving provisions included in a written law shall be without prejudice to the application of section 28, 29, 30 and 32 in respect of that law.

[92] We agree that the CMO is no longer relevant when it was repealed on 1 March 1982 except for the purposes of s 30 of Act 388. In *Tengku Besar Zabaidah*, with reference to s 15 of the Interpretation and General Clauses Ordinance 1948 (which is s 79 in Act 388), the court held that the implication of the provision is clear in that no action can be brought to claim any right conferred by any law after the repeal of that law although it does not affect any proceedings during the existence of such law. The learned judge cited the case of *Kay, Assignee of Sherwin, v Goodwin* (1830) 6 Bing 576 where Tindal CJ explained the effect of a repeal at p 582 as follows:

> I take the effect of repealing a statute to be obliterate it as completely from the records of the Parliament as if it has never been passed: and it must be considered as a law that never existed except for the purpose of those actions which were commenced, prosecuted and concluded whilst it was an existing law.

[93] By virtue of s 30 of Act 388 and s 4 of Act 164, the marriage of the deceased and the defendant was preserved and saved when the CMO was repealed. The deceased was guilty of bigamy when he contracted another marriage with the first plaintiff when his marriage to the defendant was subsisting.

[94] With the repeal of the CMO and the enactment of Act 164, in the context of a polygamous marriage contracted before 1 March 1982, the marriage is valid and shall be deemed to be registered under Act 164 by virtue of s 4. However, a subsisting polygamous marriage that can be preserved or saved and deemed to be registered pursuant to s 4 of Act 164 must be a marriage which is valid under the law, religion, custom or usage under which it was solemnised, and not otherwise. With the legislative intent made very clear as provided in s 4, is untenable to suggest that the law recognises as valid all customary marriages contracted before 1 March 1982 and the marriages are to be deemed registered by Act 164.

[95] By virtue of the CMO, the disputed customary marriage was already invalid and void pursuant to the deceased's marriage to the defendant that was first in time and registered under the CMO. Therefore there was no valid solemnisation of the disputed customary marriage within the meaning of s 4 of Act 164. In the premises, the disputed customary marriage cannot be deemed to be registered under Act 164. We accordingly hold, in giving effect to s 5 of the CMO, that the second and the third plaintiffs are not the lawful children and next of kin of the deceased.

[96] We allow the appeal with cost of RM20,000 to the appellant and set aside the order of the High Court dated 3 May 2019 accordingly. Cost is subject to payment of allocatur fees.

Appeal allowed with costs.

Reported by Nuzul Fitrie